84-813

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

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NO._____

HERSHEL D. MURVINE, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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November 13, 1984

36 pp

IN THE SUPREME COURT OF THE UNITED STATES

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HERSHEL D. MURVINE, Petitioner,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, HERSHEL D. MURVINE, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 6, 1984.

QUESTION PRESENTED

I.

WHETHER THE SUPREME COURT SHOULD EXERCISE ITS SUPERVISORY POWER AND ORDER THAT AN ACCOMPLICE INSTRUCTION MUST BE GIVEN IN ALL CASES WHERE AN ACCOMPLICE TESTIFIES FOR THE GOVERNMENT FOR THE SAKE OF RESOLVING CONFLICT BETWEEN THE DIFFERENT COURTS OF APPEALS AS TO THE PROPRIETY OF GIVING THE INSTRUCTION AND ALSO FOR THE SAKE OF JUDICIAL ECONOMY.

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## OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of Indiana.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 6, 1984. A timely petition for rehearing **In Banc** was decided on October 6, 1984, and this petition for certiorari was filed within 60 days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

## STATEMENT OF THE CASE

On March 18, 1983 in the United States District Court for the Northern District of Indiana, a five count indictment was filed against petitioner, Hershel D. Murvine and James F. Magnus, who was severed from

Muvrine. The indictment charged Herschel Murvine, age 69 (Tr. 512), and James Magnus with conspiracy, in Count I, under 18 U.S.C. 371. Counts II and III charged Murvine with possession and sale (18 U.S.C. 659) of stolen goods, stolen in February and transported in March, 1982. These transactions were the "first load" referred to below. Counts IV and V refer to the "second load" and have a charge date of June 30, 1982. The "loads" were of steel, stolen by persons other than Murvine from interstate shipments.

The overt acts charged primarily describe the acts of William Kramer - who was not indicted but charged by information - - who became a Government "source" at various times. The principal witnesses at the trial were the defendants, Murvine, and William Kramer, the Government cooperating person. Neither had a police record. (Tr. 193, 512).

When Murvine met Kramer - who was a steel broker - in 1981, Murvine had a factoring business which consisted of buying invoices at discount with the hope of gaining ten percent on each transaction. (Tr. 185, 194, 195, 358, 481). After buying the invoices, Murvine would attempt to collect from the purchaser. (Tr. 358). Murvine also loaned money to Kramer (Tr. 364) but Kramer did not completely repay him. After Kramer met Murvine through an advertisement, (Tr. 351) Kramer began factoring legitimate invoices arising out of sales of steel with Murvine in February, 1981. (Tr. 519). Later, Kramer sold invoices arising from sales of stolen steel, and at some point allegedly told Murvine. (Tr. 245).

Every transaction between Kramer and Murvine was handled with checks and invoices, and full details were kept in written records. (Tr. 351, 519). However, Kramer said that certain transactions involving

stolen steel may have been concealed from Murvine. (Tr. 353).

Kramer received compensation and expenses from the Government (Tr. 388, 419) to tape record telephone calls and wear body recorders in conversations with Murvine, Magnus, and others not involved in this trial. The FBI gave him ideas for conversations, and some of the criminal references were "just for the tape." (Tr. 382, 420-423). The recordings began after Kramer was caught by the FBI; at first he denied any knowledge of stolen steel, but later decided to cooperate. (Tr. 383). Kramer cooperated from May to mid-June of 1982; then, as to Murvine, stopped; bought stolen steel and sold it to a customer found through Murvine, and then resumed cooperation in July, 1982.

In November, 1982, Kramer brought Murvine to an FBI "scam" warehouse at Valparaiso, Indiana. A videotape was made, and further

recordings were taken concurrently, and out of the sight of the videotape recorder. No transaction occurred on videotape.

Kramer acquired the first load in February, 1982, from Longanetti, (Tr. 31) a cooperating witness who testified that Kramer knew the steel was stolen. (Tr. 31, 32)

After buying the steel, Kramer approached Murvine; Murvine had it shipped to a proposed user in Chicago (Tr 426), where it was inspected by Murvine, Kramer, and others. (Tr. 41, 50). Murvine factored the invoices at a purchase price for the steel consistent with such goods. (Tr. 56).

The purchaser, Mr. Salmon, complained about the quality, and discussed going to the manufacturer on a question relating to quality. (Tr. 72). Kramer authorized Salmon to go to the mill with his inquiry. (Tr 80, 208, 209). Salmon's inquiries led to Kramer's first visit from the FBI,

at which time he denied that the steel was stolen. (Tr. 209-210). Salmon believed Kramer, who told him that he did not know that the goods were stolen, because Kramer had allowed Salmon to complain directly to the mill about the steel. (Tr. 437, 438).

When the steel was at the place of business in Chicago, Murvine removed mill markings. (Tr. 274) A steel broker expert witness for Murvine said that it was common for brokers who deal in steel to remove origination markings, because, otherwise purchasers would go directly to the source of the steel and thereby cut out the broker. (Tr. 493-496).

In June, 1982, Kramer purchased stolen steel from cooperating witness Harvard (Tr. 268), and approached Murvine for financing. Kramer was not in that transaction, recording Murvine. Murvine using the name "Robert Martin," had the steel shipped by a freight line to a

warehouse at Chicago (Tr. 152, 274), and, through Magnus, sold it to a Mr. Krevitz, a user, in Pennsylvania. (Tr. 160). Krevitz sent a truck to Chicago to pick up the steel, and paid for it, to Murvine's company, by check. (Tr 156). The price was below the mill price, but Krevitz explained that by saying that the mill would give extended credit, and Murvine ("Martin") wanted to be paid on delivery.(Tr. 173). While this transaction was going on, Kramer was recording persons other than Murvine for the FBI (Tr. 344). This transaction was discovered by the FBI, and Kramer resumed cooperating, and thereafter resumed taping Murvine.

On the last day of the trial the jury saw a videotape of Murvine, Kramer, and an FBI agent using the name "Bromley" at the Valparaiso, Indiana, warehouse used by the FBI as part of a "sting" operation. (Tr. 299, 300) Kramer, Bromley, and Murvine walked around, looking at and discussing

steel. The steel was not called "stolen" in front of Bromley. No transaction resulted from the Valparaiso visit by Murvine. (Tr. 471) After leaving the warehouse, Murvine and Kramer and a person described as "Betty Last Name Unknown" went to a tavern; the resulting tape contained references that indicated that Murvine knew the goods Bromley offered were stolen.

Shortly after that visit Kramer called Magnus, and placed words indicating "stolen" into the conversation about the Valparaiso inventory; this conversation was admitted in evidence pursuant to the co-conspirator exception. (Tr. 316).

The Valparaiso visit followed two legitimate transactions between Murvine and Kramer between August and November. (Tr. 370). There was no evidence of any transaction other than legitimate transactions after June 30, 1982. (See Defendant's Exhibit U).

Defendant was convicted on all counts and sentenced to five years imprisonment (concurrent). (R. 45, Tr. 672-682).

On appeal, the petitioner maintained, among other things, that the trial court erred, both, by failing to include an accomplice instruction regarding the credibility of accomplice testimony and by giving an instruction on perjury, a crime for which the petitioner was not charged. The Court of Appeals for the Seventh Circuit held that the lack of an accomplice instruction was not error because the accomplice testimony was supported by a minimum amount of corroboration.(See Opinion p. 10). As to the instruction regarding perjury, the reviewing court found that this instruction merely informed the jury that the government had the discretion to prosecute any witness in the defendant's trial with offenses relating to the alleged crime or with offenses committed during the course of the trial. (Opinion p.10).

The petitioner then petitioned for a rehearing **In Banc** but the Seventh Circuit denied the motion. It is from this denial that petitioner seeks a writ of certiorari.

**REASONS FOR GRANTING THE WRIT**

1. The decision of the court below conflicts with the decisions of some other courts of appeals as to the necessity of giving an accomplice instruction when the government relies on such testimony to convict defendant.

The Court of Appeals for the Seventh Circuit held in this case that a lack of an accomplice instruction, where an accomplice is used by the Government to establish guilt, is not error, if the accomplice testimony is supported by a minimum amount of corroboration. (See Opinion p. 10).

The opinion of the court below is contrary to, and in conflict with many

opinions of other Circuit Courts of Appeals.[1]

Illustrative of holdings contrary to the Seventh Circuit are the cases of **Hull v. United States** (CA5) 1963) 324 F.2d 817; **Phelps v. United States,** (1958, CA 5) 252 F2d 49;**Dunn v. United States** (1963, CA5) 318 F2d 89; **Davis v. United States** F2d 1126; (1969, CA5) 411/ **Williamson v. United States** (1964 CA5) 332 F2d 123; **Tillery v. United States** (1969, CA5 Ga) 411 F2d 644 of the

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[1] See 17 ALR Fed. 249-333 "Necessity of, and Prejudicial Effect of Omitting, Cautionary Instruction to Jury as to Accomplice's Testimony Against Defendant in Federal Criminal Trial" for a full discussion of subject. However, in **U.S. v. Wasko** (CA 7) 437 F2d 1282) the 7th Circuit held that where lack of accomplice testimony was uncorroborated, District Court's refusal to give cautionary instruction on weight to be given accomplice's testimony or appropriate substitute instruction, constituted reversible error. This case apparently created an intracircuit conflict.

Fifth Circuit which held that the omission of a cautionary instruction as to accomplice testimony was reversible error.[2]

Additionally, and contrary to the Court of Appeals for the Seventh Circuit, the United States Court of Appeals for the Ninth Circuit held in several recent appeals that the trial court's refusal to

[2] Id.17 ALR Fed 324. Later Case Service 72-74 cited case of **United States v. Kelly** (CA 5 Fla) 569 F2d 928, cert den (US) 58 L.Ed 2d 123, 99 S.Ct. 105, wherein it was pointed out that failure to give accomplice instruction was not error where the government rested its case upon both accomplice and non- accomplice testifying to substantially the same alleged facts as the accomplices. The Fifth Circuit, in **United States v. Simmons** (CA 5 Ga) 501 F2d 831, overruled a defendant's contention that an accomplice instruction should not have been given where the court found that the government's witness could have been indicted for aiding and abetting defendant.

give special instruction on testimony of an accomplice when that testimony was important to Government's case, constituted prejudicial error, despite Government's contention that summation arguments of defendants' counsel adequately admonished jury to consider accomplice testimony with caution. **United States v. Patterson** (CA9 Wash 1981) 648 F2d 625; **United States v. Bernard** (CA 9 Wash 1980) 625 F.2d 854 and **United States v. Davis,** 439 F2d 1105, (9th Cir. 1971). The Tenth Circuit was in accord with the holding of the aforementioned cases in the case of **United States v. Hill,** 627 F2d 1052 (10th Cir. 1980).

Larded on the aforementioned are the cases of **United States v. Masino** (1960, CA2 NY) 275 F2d 129; **Lett v. United States** (1927, CA 8 Okla) 15 F 2d 686; **United States v. Davis** (1971, CA 9 Cal) 439 F 2d 1105; **United States v. Marsh** (1971, CA 9 Idaho) 451 F2d 219; **Freed v. United**

**States** (1920) 49 App. DC 392, 266 F 1012; **Egan v. United States** (1923) 52 App DC 384, 287 F 958 and **Stephenson v. United States** (1954, CA 9 Alaska) 211 F2d 702 where it was held to be reversible error to refuse to give the accomplice testimony instruction upon defendant's request.[3]

[3] In **U.S. v. Masino** id. along with other errors; **United States v. Davis** id. the court also noted that the defendant's guilt rested almost entirely upon the accomplice's testimony, and the accomplice gave contradictory stories in an apparent attempt to inculpate defendant; In **United States v. Marsh** id. the court, while holding that the failure to give accomplice instruction where not requested, was not plain error; such instruction must be given, when requested. In **Egan v. United States** id. the court also found other errors and did not discuss the effect that these errors impacted upon the necessity of giving the accomplice instruction.

Similiarly in **United States v. Owen**, (CA 10, 1972) 460 F2d 268, even though an accomplice instruction was not requested, the Court of Appeals for the 10th circuit held that an accomplice instruction must be given, and when not given, the failure to do so is plain error under Rule 52 (b), Fed R. Crim P.

As can be deduced from the aforementioned cases, the various courts of appeal are in disarray as to whether an accomplice instruction should be given when an accomplice's testimony is offered. "The Supreme Court of the United States has furnished little guidance as to the necessity of - or the prejudicial effect of omitting - a cautionary instruction as to an accomplice's testimony." 17 ALR Fed 2d 249, 318 "Necessity of, and Prejudicial Effect Of Omitting, Cautionary Instruction

to Jury As To Accomplice's Testimony Against Defendant in Federal Criminal Trial."

In these days of "ABSCAM" and "sting" type operations, this court's guidance is not only necessary, but imperative. A step in the right direction would be to resolve the conflicting opinions regarding the necessity of giving an accomplice instruction in the event the government uses accomplice testimony.

According to various legal writers, and presumably the public in general, recent "ABSCAM" and "sting" type operations raised complex and troubling constitutional questions.[4]

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[4]See ABSCAM, the judiciary, and the ethics of entrapment, B.L. Gershman. 91 Yale L J, 1565 - 91 Jl '82. ABSCAM: time for the United States Supreme Court to clarify the due process defense. 16 Ind. L Rev. 581-610 Spr. '83; Supreme Court, entrapment, and our criminal justice dilemma. L. M. Seidman. 1981 Sup Ct.Rev 111-55 '81..

Since the advent of ABSCAM the public has focused on the fairness of using accomplice evidence. It is imperative that public confidence be maintained in the judiciary. Numerous appeals are predicated upon the failure to give the accomplice instruction and as a matter of due process, this court should mandate the giving of the accomplice instruction in all cases where accomplice testimony is used by the government.

2. The decision below raises significant and recurring problems concerning the necessity of giving an accomplice instruction.

In 17 ALR Fed 249, 318 "Necessity of and Prejudicial Effect Of Omitting, Cautionary Instruction To Jury As to Accomplice's Testimony Against Defendant

in Federal Criminal Trial", it was stated, inter alia:

> The United States Supreme Court has furnished very little guidance as to the necessity of - or the prejudicial effect of omitting - a cautionary instruction as to an accomplice's testimony. Some early Supreme Court cases - **Holmgren v. United States** (1910) 217 US 509, 54 L ED 861, 30 S Ct 588, and **Caminetti v. United States** (1917) 242 US 470, 61 L Ed 442, 37 S Ct. 192 - appear to support simply the view that where a cautionary instruction as to accomplice testimony is requested in a form which states the law incorrectly, the requested instruction does not need to be given. . . .
>
> In a more recent Supreme Court case, **On Lee v. United States** (1952) 343 US 747, 96 L ED 1270, 72 S Ct 967, reh den 344 US 848, 97 L Ed 659, 73 S Ct 5, it was recognized that to the extent that the use of accomplices may raise serious questions of credibility, a defendant is entitled to have the issues submitted to the jury "with careful instructions." Also, see **Washington v. Texas** (1967) 388 US 14, 18 L ED 2d 1019, 87 S Ct 1920, wherein the

> Supreme Court stated that common sense would suggest that an alleged accomplice has a great "interest in lying in favor of the prosecution . . ., especially if he is still awaiting his own trial or sentencing" at the time he testifies. And see **Cool v. United States** (1972) 409 US 100, 34 L Ed 2d 335, 93 S Ct 354, wherein the Supreme Court recognized that instructions as to accomplice testimony have long been in use and have been repeatedly approved, and that such instructions represent a commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity. In none of these cases, however, did the Supreme Court expressly state whether or under what circumstances (1) a cautionary instruction referring specifically to accomplice testimony is necessary, or (2) the omission of such an instruction is prejudicial."

As previously shown in Argument 1,

(Page 13)

supra, the various courts of appeal, in their rulings

regarding the necessity of the giving of an accomplice instruction, when requested - and in some cases when not requested - are in disarray. Whether an accomplice instruction should be given causes frequent appeals as shown by the analysis contained in 17 ALR Fed 249 id. This recurring problem can easily be resolved by using a single cost-benefit test of general applicability for deciding whether due process mandates the trial court giving of an accomplice instruction in all cases where the instruction is requested where accomplice testimony is offered by the Government. **Mathew v. Eldridge** 424 U.S. 319, 335 (1976). The benefit of giving the accomplice instruction in all cases where an accomplice testifies for the government would be great but the cost slight. The government would be hard pressed to make a convincing argument

that its cases would be hurt by the giving of an accomplice instruction in all cases where an accomplice testifies. Indeed, much of the criticism generated by so called "sting" operations and "Abscam" type cases can be ameliorated by this court standing as a barricade against any excesses by the executive branch of the government in such cases. Settling the unsettled question of when an accomplice instruction should be given, by requiring the accomplice instruction to be given, in all cases where an accomplice testifies for the government, settles the unsettled.

Respectfully submitted,

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APPENDIX

In the

# United States Court of Appeals

## For the Seventh Circuit

No. 83-2675

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

HERSHEL D. MURVINE,

*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. H CR 83-21—Michael S. Kanne, *Judge.*

ARGUED MAY 29, 1984—DECIDED SEPTEMBER 6, 1984

Before POSNER and FLAUM, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

FLAUM, *Circuit Judge.* This is an appeal from the defendant's convictions of conspiracy to possess and dispose of goods stolen from interstate shipments and to transport those goods in interstate commerce, and of possession and interstate transportation of goods stolen from interstate shipments. For the reasons set forth below, we affirm.

* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, Eastern Division, is sitting by designation.

On February 23, 1982, five coils of stainless steel, valued at $43,997, were stolen from a freight truck parked outside a restaurant in Hammond, Indiana. William Kramer acquired the coils on February 26, after being informed that they were stolen. Kramer then contacted the defendant, who instructed Kramer to ship the coils to a plant near Chicago, Illinois. Within the following month, the defendant was successful in his attempts to locate a purchaser for the coils, and he sold the coils to Theodore Salmon on March 22, 1982.

Shortly after the sale of the steel coils, Salmon notified the Federal Bureau of Investigation (FBI) of his suspicions that the coils were stolen. The FBI questioned Kramer, who initially denied any wrongdoing but then agreed to cooperate as a confidential informant of the FBI.

In June 1982, Kramer engaged in another sale of stolen steel without the FBI's knowledge, although he continued to cooperate with the FBI on other matters. In the June transaction, Kramer came into possession of three stainless steel coils, valued at $36,515, which had been stolen in Toledo, Ohio. Kramer contacted the defendant, who directed Kramer to have the coils shipped to a warehouse in Chicago. After delivery of the coils, the defendant arranged through James Magnus to sell the coils to Envoy Stainless Steel Company. On July 14, 1982, a representative of Envoy met with the defendant, who was using the name "Robert Martin." At the end of the meeting, the Envoy representative paid the defendant $32,925 for the coils.

A grand jury indicted both the defendant and Magnus on March 18, 1983, charging them with conspiracy to possess and dispose of stolen goods and to transport these goods in interstate commerce, and with possession and interstate transportation of the steel coils stolen in June 1982. The grand jury also charged the defendant, but not Magnus, with possession and interstate transportation of the coils stolen in February 1982. Although the defend-

ant and Magnus were to be tried together, the district court granted a severance on the morning of July 18, 1983, the first scheduled day of trial. The court announced that the defendant's trial would proceed, but Magnus's trial would begin on the following Monday.

The government presented its case against the defendant for four and one-half days. On Friday, July 22, the government finished presenting its evidence during the morning session, which began at 9:15 a.m. and ended at 12:15 p.m. After a lunch break of over two hours, the court reconvened at 2:30 p.m., and the defense began presenting its case. The defense called three witnesses before the defendant took the witness stand at approximately 4:30 p.m. Shortly after 7:00 p.m., the defendant's testimony ended. Following the brief examination of one more defense witness, the defense rested at 7:20 p.m. The court then held an instruction conference outside the presence of the jury until approximately 8:05 p.m., when closing arguments began. After the completion of the arguments, the judge instructed the jury, and the jury recessed for deliberations at approximately 9:30 p.m. At 11:20 p.m., the jury announced its verdict of guilty on all counts.

In appealing his convictions, the defendant argues first that the district court's scheduling of the trial deprived him of a fair trial. The defendant further contends that the evidence was insufficient to support his convictions. Finally, the defendant maintains that errors in the trial court's instructions to the jury collectively operated to deprive him of a fair trial.

## SCHEDULING OF TRIAL

It is the defendant's position that the scheduling of his trial prejudiced his case both by compressing his defense and by coercing the jury verdict.

Compression of Defense

According to the defendant, the trial court indicated to the jury that it wanted to conclude the trial by Friday, July 22, and "the pressure was on the defense" during both the government's case and the presentation of the defense to hurry the trial along to its Friday completion. Appellant's Brief at 10-11. The defendant points to several instances where the trial court told the defense counsel that he should "just keep going" and that he "should be able to finish [his] case without a break" on Friday. *Id.* at 11. The government responds by asserting that the trial court did not curtail the presentation of the defense in any way and that the court treated the prosecution and the defense equitably throughout the trial.

It is clear that a district court has wide discretion in the scheduling of a trial and that this discretion should not be disturbed in the absence of manifest abuse. *United States v. Van Dyke*, 605 F.2d 220, 227 (6th Cir.), *cert. denied*, 444 U.S. 994 (1979); *Carter v. United States*, 373 F.2d 911, 914 (9th Cir. 1967). *See United States v. Walker*, 559 F.2d 365, 371 (5th Cir. 1977). Such abuse was found in *United States v. Diharce-Estrada*, 526 F.2d 637 (5th Cir. 1977), where the trial began at 7:30 p.m., after the jury had spent the entire day waiting to serve and only minutes after the defense counsel had finished another trial. The trial court required that closing arguments be delivered that evening, as punishment to the defense counsel, who had requested that he be allowed to present more evidence on the following day. The Fifth Circuit ruled that "the abbreviated nocturnal trial accorded Diharce simply will not pass muster as a fair way to resolve the close factual issues in his case." *Id.* at 650-51.[1]

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[1] Although the Fifth Circuit found the scheduling of trial in *Diharce-Estrada* to be error, the court held no view as to whether this error alone was sufficiently prejudicial to require reversal. *United States v. Diharce-Estrada*, 526 F.2d at 641. The court vacated the conviction on the basis of the entire record, which

(Footnote continued on following page)

In the present case, the defendant's trial took place over five days. There is no suggestion in the record that, during the prosecution's case, the trial court limited the defense counsel in cross-examining government witnesses.[2] Furthermore, this case differs from *Diharce-Estrada* in that the record does not indicate that the defense counsel needed more than the afternoon and evening of Friday, July 22, to present evidence. The defense counsel voiced his only objection to the time allotted for the presentation of his case during the cross-examination of the defendant. At about 7:00 p.m., the defense counsel asked for a sidebar conference during which he stated that, after two and one-half hours of testifying, "[the defendant] is not the same man that I put on the stand." Trial Tr. at 586. In response, the trial court promptly observed for the record that the defendant "seems to be coherently testifying just as he did when he took the stand." *Id.* Giving, as we must, due deference to the observations of the trial court, we are unable to conclude, from the record before us, that the scheduling of trial unfairly compressed the presentation of the defense.

## Coercion of Jury Verdict

The defendant's second argument regarding the scheduling of trial is that the trial court's effort to complete the trial on Friday, July 22, led to mistreatment of the jury. The defendant states that "the [Friday] afternoon session began at 2:30 p.m., and went through to the return of the verdicts at 11:20 p.m., without supper for

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[1] *continued*
also revealed that the trial court erroneously denied the defendant's motion for acquittal in the presence of the jury and that the prosecutor made a number of improper remarks during closing argument. *Id.* at 641-42.

[2] Indeed, the record reflects that after defense counsel cross-examined Kramer for several hours on the afternoon of Thursday, July 21, the trial court allowed cross-examination to continue on the following morning. *See* Trial Tr. at 320-443.

the jury or anyone else." Appellant's Brief at 9. Observing that the jury worked all day on July 22 with only a lunch break, the defendant maintains that the jury was forced to reach its verdict without giving the case the consideration that a rested and well-fed jury would have given. The government, on the other hand, informs us that the jury received supper when it began its deliberations. Furthermore, according to the government, the jury received two breaks before lunch on the morning of July 22, and the court ordered two recesses during the presentation of the defendant's case. In addition, the government notes that the jury received another recess at the close of the defendant's case while the court conducted the jury instruction conference. Stating that "the final day of trial was liberally peppered with rest periods for the jury and the parties, [and that] the jury was fed and generally cared for," the government disagrees that the jury was coerced into rendering its verdict without due consideration. Appellee's Brief at 22.

In *United States v. Diharce-Estrada*, 526 F.2d at 640, the trial judge opened the trial at 7:30 p.m. by informing the jurors that it was essential to complete the case by the following evening so that the judge could catch a plane. The Fifth Circuit held that these remarks, coupled with the immoderate treatment that the trial court gave to the defense counsel for his alleged attempts to delay the trial, "put undue pressure on the jury to reach a verdict more swiftly than the ends of justice will allow." *Id.* In addition, reviewing courts have held that a jury can be coerced into reaching a verdict by an improper *Allen* charge, a supplementary instruction that a trial court may give when it appears that a jury is deadlocked. *See, e.g., United States v. Chaney*, 559 F.2d 1094 (7th Cir. 1977) (where jurors could have understood *Allen* charge as meaning that they must reach a verdict to avoid being locked up, without sleep, until 9:30 a.m. or later, verdict was vacated and case was remanded for new trial); *United States v. Flannery*, 451 F.2d 880, 883 (1st Cir. 1971) (trial court erred in reminding jury, in *Allen* charge,

that it was Friday afternoon, since the implicit suggestion was that it was more important to be quick than to be thoughtful).

In the present case, the trial court did not give an *Allen* charge to the jury at any time during the deliberations. Moreover, although the court informed the jury during the trial that a companion case was scheduled to begin on Monday, July 25, and that there would be an effort to conclude the defendant's trial by Friday, July 22, the court certainly did not suggest, as did the court in *Diharce-Estrada*, that it was imperative to meet this deadline.

Nevertheless, we recognize that, regardless of a trial court's statements, jurors who begin deliberations at 9:30 on a Friday night, after a full day of trial and after serving all week, may be eager to reach a verdict and go home. For this reason, we do not encourage such scheduling, and we urge trial courts to poll jurors regarding their willingness to begin deliberations under such circumstances. Yet, we decline to hold, without clear indications that the jury was exhausted, hungry, confused, or otherwise uncomfortable, that deliberations begun on a Friday night are incapable of producing a fair verdict. After reviewing the record in the present case, we note with disapproval that when the defense counsel, during the instructions conference, raised his concerns regarding the lateness of the hour and the exhaustion of the jurors, the trial court summarily refused to poll the jurors to determine their willingness to begin deliberations. However, the court did find the jury "alert and fresh." Trial Tr. at 601. Furthermore, the court informed the jury before closing arguments that arrangements were being made for supper, and, apparently, supper was served as the jury began deliberating.[3] The jury did not ask for

[3] The government has appended a voucher and two receipts that show that 21 Italian beef sandwiches and beverages were purchased for the jurors and delivered at 9:00 p.m. on July 22, 1983. Government Appendix 22. In addition, the trial transcript indicates

(Footnote continued on following page)

clarifications during its deliberations, nor was the case so difficult that a decision rendered within two hours should be suspect. In sum, although we believe that the better course for the trial court would have been to poll the jurors regarding their willingness to start deliberations, the record in this case does not support the defendant's contention that the circumstances surrounding the jury's deliberations were coercive. We thus conclude, under the facts of this case, that the trial court did not abuse its discretion by allowing deliberations to begin at 9:30 on a Friday night.

## SUFFICIENCY OF EVIDENCE

The defendant argues that the evidence produced by the government was insufficient to sustain the jury's verdict. In support of this argument, the defendant points to the fact that he kept precise records of all his transactions. Asserting that he conducted his steel sales "in a most ordinary way," Appellant's Brief at 20, the defendant contends that his openness in record-keeping is consistent only with legitimate business and should create reasonable doubt on the question of his intent.

When determining the sufficiency of the evidence to support a criminal conviction, a reviewing court must decide "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). *See also Jentges v. Milwaukee County Circuit Court*, 733 F.2d 1238, 1240 (7th Cir. 1984); *United States v. Roman*, 728 F.2d 846, 857 (7th

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[3] *continued*
that this food was given to the jurors upon their retirement to begin deliberations. When the trial court excused the two alternate jurors at 9:37 p.m., he invited them to take their dinner home with them, thus indicating that food was being given to the deliberating jurors. *See* Trial Tr. at 664-65.

Cir. 1984); *United States v. Moya*, 721 F.2d 606, 609 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1312 (1984).

In the present case, there is considerable evidence that the defendant's business records served to camouflage his illegal activities. During several conversations recorded by Kramer while cooperating with the FBI, Kramer expressed gratitude to the defendant for demonstrating how false paperwork can disguise a stolen shipment of steel. The defendant at one point reminded Kramer that paperwork is "your big ticket." Government Ex. No. 27, at 43. Viewing such evidence in the light most favorable to the prosecution, we hold that a rational trier of fact clearly could have found the necessary illegal intent on the part of the defendant. Furthermore, our review of the evidence as a whole convinces us that a rational jury also could have found the other elements of the crime beyond a reasonable doubt.[4]

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[4] The government introduced at trial a videotape and several recordings of conversations concerning a potential sale of stolen steel coils that the FBI had set up in November 1982. Kramer, who was cooperating with the FBI, told the defendant that a man named "Bromley," who was an undercover FBI agent, had stolen steel coils and wished to sell them. On November 9, Kramer, the defendant, and "Bromley" met in a warehouse in Valparaiso, Indiana, where the defendant examined the steel and indicated that he could sell it. A videotape was made of this meeting, and recordings were made of two subsequent conversations in which the defendant told Kramer that Magnus had located buyers for the steel. In later recorded conversations between Magnus and Kramer, Magnus acknowledged that he knew the steel was stolen. In arguing to this court that there is insufficient evidence to sustain his conviction, the defendant contends that the November recordings were inadmissible at trial because they did not prove any wrongdoing related to the steel coil sales of February and June 1982, and they did not constitute evidence of a continuing conspiracy.

At this point during trial when the recordings of the Magnus/Kramer conversations were offered into evidence, the trial court ruled that sufficient nonhearsay evidence had established the existence of a stolen steel conspiracy. The court thus found Magnus's

(Footnote continued on following page)

## JURY INSTRUCTIONS

The defendant maintains that the trial court erred both by failing to include an accomplice instruction regarding the credibility of Kramer's testimony and by giving an instruction on perjury, a crime for which the defendant was not charged.

This court recently held that the lack of an accomplice instruction is error only if the accomplice's testimony is not supported by a minimum amount of corroboration. *United States v. McCabe*, 720 F.2d 951, 956 (7th Cir. 1983). *See also United States v. Lee*, 506 F.2d 111, 120-21 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1002 (1975). Our review of the record in the present case leads to the conclusion that Kramer's testimony was amply corroborated by recorded conversations, the testimony of other witnesses, and business records. The trial court thus did not err in failing to give an accomplice instruction relating to Kramer's testimony.

We also find no merit to the defendant's contention that the trial court erred by instructing the jury on the crime of perjury. In its Instruction No. 33, the court stated: "All federal criminal prosecutions are initiated by the office of the United States Attorney, including all prosecutions for perjury." This instruction merely informed the jury that the government has the discretion to prosecute any participants in the defendant's trial with offenses relating to the alleged crime or with offenses committed during the course of the trial. The jury thus was not to consider the behavior of other participants in its deliberations regarding the defendant. We do not find that this instruc-

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[4] *continued*
statements admissible as a co-conspirator's statements made during the course of and in furtherance of the conspiracy. *See United States v. Santiago*, 582 F.2d 1128, 1131 (7th Cir. 1978). We find that this ruling was correct. Furthermore, we find that the defendant's November statements, which were nonhearsay admissions of wrongdoing, were admissible to prove the continuance of the conspiracy through November 1982.

tion explained the elements of the crime of perjury, nor did it direct the jury to decide whether the defendant committed perjury. *Cf.* 2 Federal Criminal Jury Instructions of the Seventh Circuit, ch. 79 (1983) (perjury instructions). We therefore conclude that the trial court did not instruct the jury on an offense that was not charged, and no error was committed.

Accordingly, we affirm the defendant's convictions.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

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CLERK

No. 84-813

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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HERSHEL D. MURVINE, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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REX E. LEE
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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

Petitioner contends that the district court erred in refusing to instruct the jury on the credibility of accomplice testimony.

1. After a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on one count of conspiring to possess and dispose of goods stolen from interstate shipments and to transport those goods in interstate commerce, in violation of 18 U.S.C. 371; two counts of possessing goods stolen from interstate commerce, in violation of 18 U.S.C. 659; and two counts of interstate transportation of goods stolen from interstate shipments, in violation of 18 U.S.C. 659. He was sen-

tenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 1-11).

The evidence is summarized in the opinion of the court of appeals (Pet. App. 2). It showed that on February 26, 1982, William Kramer acquired five coils of stainless steel wire that he knew had been stolen.[1] Kramer then contacted petitioner, who instructed Kramer to ship the coils to a plant near Chicago, Illinois. Petitioner subsequently sold the coils to Theodore Salmon.

Shortly after this purchase Salmon notified the FBI that he suspected the coils were stolen. The FBI questioned Kramer, who initially denied any wrongdoing but then agreed to cooperate as a confidential informant.

In June 1982, Kramer, without the FBI's knowledge, came into possession of three more stainless steel coils, valued at $36,515, that had been stolen in Toledo, Ohio. Kramer contacted petitioner, who directed Kramer to ship the coils to a warehouse in Chicago. Petitioner, using the name "Robert Martin," later sold the coils to Envoy Stainless Steel Company for $32,925.

2. Kramer testified for the prosecution at petitioner's trial. Petitioner contends that the district court erred in refusing to give the jury an "accomplice instruction" regarding Kramer's credibility.[2]

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[1] The coils, valued at $43,997, had been stolen three days earlier from a freight truck parked outside a restaurant in Hammond, Indiana.

[2] Petitioner requested the following instruction (Defendant's Proposed Jury Instruction No. 22):

> You have heard testimony from WILLIAM L. KRAMER who stated that he was involved in the commission of the alleged crime charged against the defendant HERSHEL

The court of appeals held (Pet. App. 10) that such an instruction was not required because "Kramer's testimony was amply corroborated by recorded conversations, the testimony of other witnesses, and business records." Petitioner does not contest the court of appeals' finding that Kramer's testimony was "amply corroborated." Instead, he argues that the district court should have given an accomplice instruction nevertheless.

At the outset we note that, although petitioner requested an accomplice instruction, he did not object to the court's failure to give one. Accordingly, he neglected to preserve his claim. See Fed. R. Crim. P. 30; *Allis* v. *United States*, 155 U.S. 117, 122 (1894); *United States* v. *Gratton*, 525 F.2d 1161, 1162 (7th Cir. 1975) ("[t]he mere offer of the instruction does not preserve the error for appeal").

In any event, the district court did not commit reversible error, if it committed error at all, in declining to give an accomplice instruction. Petitioner cites (Pet. 14-18) a number of cases in which convictions based upon uncorroborated accomplice testi-

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MURVINE. You may give his testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

The court did, however, give the following informant instruction to the jury (Tr. 660):

You have heard testimony that William L. Kramer has received benefits from the Government in connection with this case.

You may give his testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

Thus, when read in its entirety, the jury charge clearly pointed out the need for "caution and great care" in weighing Kramer's testimony.

mony were reversed because of the absence of a requested cautionary instruction.[3] Those cases offer no guidance for situations such as this case, where the accomplice's testimony was "amply corroborated" (Pet. App. 10). In such circumstances, the courts of appeals have held either that an accomplice instruction is not required or that the failure to give such an instruction, although error, does not require reversal. See, *e.g.*, *United States* v. *McCabe*, 720 F.2d 951, 955-956 (7th Cir. 1983); *United States* v. *Shuckahosee*, 609 F.2d 1351, 1356-1357 (10th Cir. 1979); *United States* v. *Wright*, 573 F.2d 681, 685 (1st Cir.), cert. denied, 436 U.S. 949 (1978); *United States* v. *Lee*, 506 F.2d 111, 119-120 (D.C. Cir. 1974), cert. denied, 421 U.S. 1002 (1975); *United States* v. *Clark*, 480 F.2d 1249, 1254 (5th Cir.), cert. denied, 414 U.S. 978 (1973); *United States* v. *Holt*, 427 F.2d 1114, 1117-1118 (8th Cir. 1970); *United States* v. *Cianchetti*, 315 F.2d 584, 592 (2d Cir. 1963); *Christy* v. *United States*, 261 F.2d 357, 361 (9th Cir. 1958); *Pittsburgh Plate Glass Co.* v. *United States*, 260 F.2d 397, 402 (4th Cir. 1958), aff'd, 360 U.S. 395 (1959). Indeed, there is no indication that any of the courts of

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[3] For example, the Ninth Circuit has held that it is error to refuse an accomplice instruction where the accomplice's testimony "supplies the only strong evidence of guilt." *United States* v. *Patterson*, 648 F.2d 625, 631 (9th Cir. 1981). Where, as here, the accomplice's testimony is strongly corroborated by other evidence, it cannot be regarded as "the only strong evidence of guilt." At all events, the Ninth Circuit has also held that where the trial court instructs the jury that it must examine a witness's testimony with care because he was an informant who received benefits from the government, it need not also give an accomplice instruction. *United States* v. *Morgan*, 555 F.2d 238, 242-243 (9th Cir. 1977). Here, the trial court gave such an informant instruction concerning Kramer (see note 2, *supra*).

appeals on whose decisions petitioner relies would regard the failure to give an accomplice instruction in the instant circumstances as reversible error.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

JANUARY 1985

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